Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-704

SHERWOOD SLATE,
Appellant

vs.

JOSEPH N. NOLL,
Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WISCONSIN

JURISDICTIONAL STATEMENT

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October 29, 1979

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IN THE

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No.

SHERWOOD SLATE,
Appellant

vs.

JOSEPH N. NOLL,
Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WISCONSIN

JURISDICTIONAL STATEMENT

Sherwood Slate, the Appellant, appeals from a final judgment of the United States District Court for the Western District of Wisconsin dated August 7, 1979, dismissing this action. The Opinion and Order, dated August 6, 1979, upheld the constitutionality of §§41.11 (1), 41.02 (23), and 42.531, Wisconsin Statutes, which required the compulsory retirement of Appellant, a civil service employee of the State of Wisconsin, at page 65. This Jurisdictional Statement is submitted to show that the Supreme Court has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Wisconsin is not reported, and is printed in the Appendix at pp. 1-14 (Ap. 1-14).

JURISDICTION

This action was brought on September 20, 1974, to enjoin the enforcement of Wisconsin Statutes, §§41.11 (1), 41.02 (23), and 42.531 requiring retirement of civil service employees at age 65, and for declaratory relief in the United States District Court for the Western District of Wisconsin. Appellant alleged that the statutes were unconstitutional by reason of the due process and equal protection clauses. (Complaint, Amendment to Complaint, Doc. 2, 7). Jurisdiction of the District Court was based upon 28 U.S.C., §§1331 and 1343 (3). A three-judge court was convened pursuant to 28 U.S.C., §§2281 and 2284 (Doc. 6 and 9). After a trial upon affidavits submitted by the parties, the Court, one judge dissenting, issued an Opinion and Order on August 6, 1979, directing entry of judgment dismissing this action. (Doc. 28, Ap. 12). Final judgment was entered on August 7, 1979 (Doc. 29, Ap. 15).

Appellant's Notice of Appeal was served and filed with the District Court Clerk on September 4, 1979 (Doc. 30, Ap. 16). This appeal is being docketed in this Court within sixty (60) days from the filing of the Notice of Appeal, pursuant to Rule 13 (1). The jurisdiction of this Court to hear this appeal rests upon 28 U.S.C., §1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment, United States Constitution, Section I:

> ... [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wis. Stats., §41.11 (1) (1975):

> *Compulsory Retirement.* Any participating employe, except an officer elected by the vote of the people, who has reached his normal retirement date on the effective date for his employer shall be retired at the end of his first calendar quarter year as a participating employe and any participating employe, except an officer elected by the vote of the people, who reaches his normal retirement date shall be retired at the end of the calendar quarter year in which such date occurs, unless, in either case, his employment is continued by his employer or appointing authority.

Wis. Stats., §41.02 (23) (1975):

> 'Normal retirement date' means the day on which a participant attains the age of 60 years if he or she is or was a protective occupation participant; 62 years if he or she is or was a supreme court justice, court of appeals judge, circuit judge, member of the legislature, state constitutional officer elected by vote of the people, or a Group D participant who is or was a county or municipal officer elected by vote of the people; or 65 years otherwise; ....

Wis. Stats., §42.531 (1975):

MANDATORY RETIREMENT OF STATE EMPLOYES IN CLASSIFIED SERVICE. Any member of the system in the classifed service of the state shall be retired at the end of the month in which he attains the age of 65 unless his appointing officer, board or commission specifically authorizes him in writing to continue in employment for a period or periods of not to exceed one year at a time.

QUESTIONS PRESENTED

(1) Did the compulsory retirement at age 65 of Appellant, a civil service employee of Wisconsin, pursuant to Wis. Stats., §§41.11 (1), 41.02 (23) and 42.531 (1975), deny him equal protection of the law?

(2) Did the compulsory retirement at age 65 of Appellant, a civil service employee of Wisconsin, pursuant to Wis. Stats., §§41.11 (1), 41.02 (23), and 42.531 (1975), deprive him of liberty and property without due process of law?

STATEMENT OF THE CASE

Appellant Sherwood Slate is a lawyer. He was born on Jaunary 9, 1909. On or about September 21, 1964, Appellant became an attorney-hearing examiner for the Wisconsin Industrial Commission, the predecessor to the Wisconsin Department of Industry, Labor and Human Relations ("DILHR"). He successfully served a probationary period, became a qualified civil service employee, and continued to serve as an attorney-hearing examiner until approximately April 8, 1974. As a nonprobationary civil servant, Appellant could not be separated from his employment nor could his employment be terminated without cause first having been established, except for the com-

pulsory retirement provisions in issue in this case (Affidavit of Sherwood Slate, Doc. 21). Joseph N. Noll, Appellee, is the Secretary of DIHLR and, as used herein, the term "Appellee" includes Mr. Noll's predecessors in office who were previously made parties to this action (Doc. 12, 13, 26 and 27).

At all relevant times during his employment and to the present, Appellant has been physically and mentally able to perform the duties of an attorney-hearing examiner with DILHR. Between June 22, 1973, and August 2, 1974, Appellant made written and oral requests to Appellee for an extension of his retirement date, and, after retirement was effected, for reinstatement. Pursuant to and acting under color of Wisconsin Statutes cited above, Appellee terminated Appellant's employment on or about April 8, 1974, and denied all requests for extension of employment and for reinstatement for the reason that there could be no exception in compulsory reitrement at age 65. In taking this action, Appellee did not consider Appellant's experience, training or competence to remain in employment, granted no hearing and considered no evidence except Appellant's age (Affidavit of Sherwood Slate, Doc. 21).

After March 31, 1974, Appellant sought employment as a hearing examiner or attorney with other agencies of the State of Wisconsin and the City of Madison. In each instance, employment was denied because of the prohibition of hiring persons whose age exceeds 65 years. Appellant also attempted to obtain employment from private firms and federal government, filing over 100 applications for employment in legal and other capacities. He has been unable to obtain any fulltime employment since the date of his retirement. Appellant has been able to obtain occasional temporary parttime work in isolated instances. Appellant's pension and Social Security income is less than one-third of the amount he was

earning before retirement. Inflation has eroded the value of his pension. Reduction of income has adversely affected his standard of living, life style, and has caused considerable concern. As a result of compelled retirement, Appellant has been deprived of salary increases and of an increase in pension and life insurance which would have resulted from annual increases in pay and additional time on the job for DILHR (Affidavit of Sherwood Slate, Doc. 21).

In addition to the Affidavit of Sherwood Slate, Appellant submitted other affidavits to demonstrate the adverse effects of compulsory retirement, both upon the individuals affected and the public generally. Expert medical testimony was given by H.K. Parks, M.D. (Doc. 25). Dr. Parks is a practicing physician, former Medical Director of the Dane County Hospital and Home, and Medical Director of the Madison, Wisconsin office of the Wisconsin Telephone Company. He is a member of the American Geriatrics Society and is the attending physician at two nursing homes in Madison, Wisconsin. Based upon his experience and numerous medical publications, he concluded that people age at different rates, the chronological age of an individual has no relationship to competency to perform ordinary tasks of employment and that compulsory retirement may adversely affect the health and well-being of a patient. He has observed numerous patients whose health and well-being were adversely affected by compulsory retirement, leading to the loss of self esteem, feelings of worthlessness, and even major depression reaction and possible suicide. He has observed patients whose health and well-being improved after they were able to obtain employment after having been retired.

Daniel W. Hildebrand, Appellant's attorney, submitted an Affidavit requesting the Court to take judicial notice of certain facts. Attached to that

Affidavit were numerous publications showing the difficulty of persons age 65 and older to obtain employment, the costs of compulsory retirement as compared to flexible retirement alternatives, and existence of administrative mechanisms for removal of incompetent employees. Documents relied upon included the report by the House of Representatives Select Committee on Aging, *Mandatory Retirement: The Social and Human Cost of Enforced Idleness,* Comm. Pub. No. 95-91 (August, 1977), and Senate Report No. 95-493 (October, 1977), which resulted from hearings conducted by the House of Representatives and the Senate prior to enacting amendments to the Age Discrimination in Employment Act which prohibited compulsory retirement of federal employees and state employees prior to age 70. 29 U.S.C., §631, 633a.

Appellee submitted the Affidavits of John L. Zimbeck, Deputy Secretary of Wisconsin Department of Employee Trust Funds, and Blair Testin, Director of Retirement Research for the State of Wisconsin (Doc. 18 and 19). Mr. Zimbeck's Affidavit explained the necessity of a "normal retirement date" in actuarial calculation of retirement annuities. Mr. Testin's Affidavit set forth five purposes served by the policy of compulsory retirement: To provide an orderly removal of older workers without hardship or prejudice, to permit the employer to plan for personnel needs in an orderly manner, to permit employees to plan for retirement based upon a specific date, to permit younger workers to fill vacancies created, and to permit the correction of past discriminations based upon sex and race.

Appellant also submitted Supplemental Affidavits of John L. Zimbeck and Blair Testin (Doc. 23 and 24), and the Affidavit of Verne Arends, retired Superintendent of Research for Northwestern Mutual Life Insurance Company (Doc. 20). Mr. Zimbeck and Mr.

Arends both testified that the "normal retirement date" was to provide a reference point upon which actuarial equivalence could be provided for those who choose to retire before or after said date. Calculations of pensions for such persons are routine and involve no administrative inconvenience. Mr. Zimbeck also revealed that 480 State employees were continued beyond age 65. Mr. Testin stated that there were no tests used by the State of Wisconsin to measure the competency or the physical and mental proficiency of employees based upon age.

On September 26, 1978, the Governor of Wisconsin promulgated a policy directive that all state employees who were scheduled to retire involuntarily by reason of age prior to January 1, 1979, might continue to work provided they were able to perform their job duties (Doc. 26).

On August 6, 1979, an Opinion and Order of Judges Doyle and Gordon was entered directing that judgment be entered dismissing this action (Doc. 28, Ap. 1-12). The Court's findings generally incorporated the allegations made in the affidavit of Appellant Sherwood Slate. In addition, the Court found that people age physically and mentally at different rates, that persons older than 65 years of age continue to be wholly competent to perform vaious tasks of employment, and some who have not yet reached the age of 65 have lost their competency. The Court found that compulsory retirement at a given age such as 65 adversely affects the health and well-being of some persons but not others, and that such adverse effects often include the loss of self esteem, feelings of worthlessness, major depression reactions and sometimes suicidal dispositions. The Court found that it is difficult for persons 65 years of age and older to obtain employment and that persons who have no employment or little employment suffer more severe

economic hardship than those who have not retired. While it is necessary for retirement plans to establish a "normal retirement date" in order to establish actuarial costs and benefits for retirees, no significant administrative difficulty is involved in accomodating desires for retirement earlier or later than the normal retirement age.

Despite the findings, the Court held that Appellant failed to meet the burden of proving that age discrimination in the challenged statutes is not rationally related to furthering a legitimate state interest. Although the Court rejected all of the purported justifications offered by Appellee (Ap. 7-9), it indicated that plaintiff did not succeed "in the essential, though perhaps impossible, task of showing that there is no significant discrepancy in the incident of incompetence resulting from aging among those approximately 55 to 60 years of age, as contrasted with those approximately 70 to 75 years of age." (Ap. 10-12).

Circuit Judge Luther M. Swygert dissented and found there was an absence of a rational basis for compulsory retirement at age 65. He noted that the current practice of selectively exempting certain Wisconsin state employees from the requirement fatally undermined the hypothetical purposes advanced by the Appellee and his predecessors for justifying the statute (Ap. 12-14).

Final judgment dismissing this action was entered on August 7, 1979 (Doc. 29, Ap. 15). The Notice of Appeal was filed September 4, 1979 (Doc. 30, Ap. 16).

ARGUMENT

The Constitutional Issues Raised Are Substantial.

A. Decisions Upholding Compulsory Retirement of Police and Foreign Service Officers Are Not Applicable to Compulsory Retirement of General Civil Service Employees.

As evidenced by the majority and dissenting opinions of the Court below, a substantial federal question exists as to whether or not compulsory retirement statutes for civil service employees should be sustained on the authority of *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976) and *Vance v. Bradley,* 440 U.S. 93 (1979).

Because of the importance of compulsory retirement statutes, their validity should not be upheld without plenary review of this Court. The overwhelming evidence is that compulsory retirement statutes resulted from inaccurate stereotyped generalizations regarding ability of older workers, stigmatizing them as physically and mentally incompetent to the detriment of the public. See House Select Committee on Aging, *Mandatory Retirement: The Social and Human Costs of Enforced Idleness,* 95th Congress, 1st Session (Comm. Print 1977) (Doc. 22); Senate Report No. 95-493, 1978 U.S.C. Cong. & Adm. News, p. 976; the publications in the record (Doc. 22, 25) and cited in Mr. Justice Marshall's dissenting opinion in *Vance v. Bradley,* 440 U.S. 93, 114 (1979). As this court recognized in *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 316-317 (1976):

> "We do not make light of the substantial economic and psychological affects premature compulsory retirement can have on an individual; nor do we denigrate the ability of elderly citizens to continue to contribute to society. The problems of retirement have been well documented and are beyond serious dispute."

Although this Court affirmed *per curiam* two decisions upholding compulsory retirement statutes applied to general civil service employees, *Weisbrod v. Lynn,* 420 U.S. 940 (1975); *Cannon v. Guste,* 423 U.S. 918 (1975), it has never given full consideration, after briefing and argument, to the constitutionality of such retirement statutes. This Court has considered the constitutionality of compulsory retirement statutes covering particular specialized occupations. In *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976) and in *Vance v. Bradley,* 440 U.S. 93 (1979), the Court upheld limited statutes requiring the compulsory retirement of state policemen at age 50 and federal foreign service officers at age 60. In each of these cases, the Court emphasized the physical fitness requirements of the particular occupation, as well as the careful consideration the legislature gave to those requirements. *Murgia,* 427 U.S., at pp. 314-15; *Bradley,* 440 U.S., at pp. 98-109.

In upholding Wisconsin's compulsory retirement statutes applicable to general civil service employees, the Court below relied upon *Murgia, Bradley* and *Trafelet v. Thompson,* 594 F. 2d 623 (7th Cir. 1979). *Trafelet* upheld the compulsory retirement of judges at age 70, relying upon the legislative history stating, at p. 627:

> "The legislature could rationally have justified treating judges differently from other officials on the ground that the work of judges makes unique and exacting demands on faculties that

> age tends to erode. The equal protection clause does not prohibit the legislature from adopting a more rigorous policy for assuring excellence in the judiciary and for other elected offices."

Totally lacking in this case is any legislative history or studies to justify the compulsory retirement age of 65. The general purposes articulated in Wis. Stats., §41.01 (1) (1975), and by the Appellee were rejected by the Court below. The analogy of Appellant's position to that of a judge (Ap. 11) must also fail. Unlike the Illinois judges in *Trafelet,* incompetent civil service employees can be removed by administrative methods. Moreover judges in Wisconsin are not compelled to retire until age 70. Wisconsin Constitution, Article VII, §24 (2).

Because of the overwhelming evidence in the record as to the lack of justification for compulsory retirement statutes generally applicable to civil service employees, the constitutionality of those statutes should not be sustained on the basis of the decisions upholding retirement of select groups of specialized employees.

B. The Decision of the Court Below Conflicts with the Equal Protection Analysis of This Court in Other Cases.

Massachusetts Board of Retirement v. Murgia, 420 U.S. 307 (1976) and *Vance v. Bradley,* 440 U.S. 93 (1979), indicated that the compulsory retirement statutes under consideration should be upheld if "rationally related to furthering a legitimate state interest," and that the "strict-scrutiny" standard did not apply. The Court below selected the proper standard, but erred in its application. It failed to consider and evaluate the broad scope of the classification and the lack of any effort to confine the classification to its purpose.

This Court has refused to decide the constitutionality of statutes mechanically by selecting one of the two standards. Instead this Court has engaged in a qualitative evaluation of the interests of the persons subject to the classification and the interests of the state advanced in justification. For example, while many cases have found unconstitutional sex discrimination based upon archaic and overbroad generalizations and outdated misconceptions about the role of women in society, e.g., *Frontiero v. Richardson,* 411 U.S. 677, 685 (1973); *Weinberger v. Wisenfeld,* 420 U.S. 636, 644 (1975); *Craig v. Boren,* 429 U.S. 190, 198-99 (1976); *Califano v. Goldfarb,* 430 U.S. 199, 205-07 (1977); *Orr v. Orr,* — U.S. —, 99 S.Ct. 1102 (1979); *Caban v. Mohammed,* — U.S. —, 99 S.Ct. 1760 (1979), other decisions have upheld differences in treatment that were not based upon administrative convenience or outworn cliches, but upon the fact that the sexes were nor similarily situated, e.g., *Schlesinger v. Ballard,* 419 U.S. 498 (1975); *Parham vs. Hughes,* — U.S. —, 99 S.Ct. 1742 (1979). In alien classification cases, *Hampton v. Mow Sun Wong,* 426 U.S. 88, 115 (1976) and *Sugarman v. Dougall,* 413 U.S. 634 (1973), this Court refused to uphold exclusion of aliens from civil service, while in *Foley v. Connelie,* 435 U.S. 291 (1978) and *Ambach v. Norwick,* — U.S. —, 99 S.Ct. 1589 (1979) this Court permitted exclusion of aliens from police work and public school teaching. Although this Court has struck down broad discriminations against illegitimates *Trimble v. Gordon,* 430 U.S 762 (1977), this Court has upheld the precisely structured statutes to support demonstrated state interests. *Lalli v. Lalli,* 439 U.S. 259 (1978).

The Court below could not find that the state had articulated any rational basis to justify its statute. Rather it broadly extended the rationale of *Vance v. Bradley* to permit the total exclusion of all persons over 65 from government employment because plaintiff could not prove a difference in general competence of workers age 55 to 60 from those age 70 to 75. The rational basis standard, as enunciated by this Court, cannot be stretched so far. A more qualitative analysis of the interests of the state and the existence of means to exclude incompetent employees similar to that used by this Court in the cases cited above would have produced a different result. This Court should review this case to consider whether or not the Court below correctly applied the rational basis standard to uphold Wisconsin compulsory retirement statutes.

C. Conflicts in Lower Court Deccecisions on the Constitutionality of Compulsory Retirement Laws of General Application Should be Resolved by This Court.

Conflicts in lower court decisions have created a need for this Court to provide authoritative guidance to the Courts. Thus, in *Gault v. Garrison,* 569 F. 2d 993 (7th Cir. 1977), the Court held that the complaint of a teacher who was forced to retire at age 65 stated a claim under the equal protection clause. The Court distinguished *Murgia* because it involved policemen. The lack of fitness related to advancing age could cause a failure to perform in a life and death situation.

But, decisions in other circuits have refused to follow *Gault. Palmer v. Ticcione,* 576 F. 2d 459 (2nd Cir. 1978), *cert. denied,* 440 U.S. — (1979), upheld the compulsory retirement of a teacher at age 70. *Issarescu v. Cleland,* 465 F. Supp. 657, 661-62 (D.R.I. 1979),

while recognizing a significant constitutional issue, upheld the compulsory retirement of a federal worker who reached age 70 proper to the effective date of 29 U.S.C., §633a. Both courts cited this Court's *per curiam* decision in *Weisbrod v. Lynn,* 420 U.S. 940 (1975) and *Murgia.* See also *Klain v. Pennsylvania State University,* 434 F. Supp. 571 (M.D. Pa. 1977), *affd.,* 577 F. 2d 726 (3rd Cir. 1978) upholding compulsory retirement of university faculty at age 65.

In *Palmer v. Ticcione,* 576 F. 2d 459 (2nd Cir. 1978), the court stated that *Gault* too narrowly conceived the possible rational basis for compulsory retirement statutes, and sustained the objective of increasing employment opportunities for young teachers. This objective was rejected in *Kuhar v. Greensburg-Salem School District,* 466 F. Supp. 806, 816 (W.D. Pa. 1979), where the Court sustained the claim of a school district administrator that his compulsory retirement at age 65 was irrational. The plaintiff was admittedly a competent administrator. A less competent administrator at a higher cost would defeat the claimed justification that the school district should provide the best education at the most affordable cost to students and taxpayers.

Another equal protection problem in this case which has resulted in conflicting decisions is the differentiation in retirement ages between civil service employees, and other broad categories of workers. In Wisconsin, compulsory retirement of state university faculty and judges does not occur until age 70. In *Nelson v. Miwa,* 56 Haw. 601, 546 P. 2d 1005 (1976), the Court held that the forced retirement of university faculty members at age 65 while other state employees were permitted to remain in employment until age 70 violated the equal protection clause. *Nelson v. Miwa* rejected decisions to the contrary of *Lewis v. Tucson School District,* 23 Ariz. App. 154, 531 P. 2d 199 (1975)

and *Townsend v. Los Angeles County,* 49 Cal. App. 3d 263, 122 Cal. Rptr. 500 (1975). A similar issue was raised in *Massachusetts v. Murgia,* 427 U.S. at p. 317, fn. 8, but was deemed unpersuasive with respect to particular job classifications of law enforcement officials because of the more demanding nature of their work.

As shown above, decisions sustaining the constitutionality of compulsory retirement laws generally applicable to civil service employees have relied upon *per curiam* decisions of this Court. Yet, many courts have conceded the substantiality of the constitutional questions involved. This Court has consistently held that summary affirmances have considerably less precedential value than opinions on the merits, *Edelman v. Jordan,* 415 U.S. 651, 671 (1974); *Fusari v. Steinberg,* 419 U.S. 379, 392 (1975) (concurring opinion). Indeed, this Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established. See *Usery v. Turner Elkorn Mining Co.,* 428 U.S. 1, 14 (1976); *Illinois State Board of Elections v. Socialists Workers Party,* 440 U.S. 173, 181 (1979). Under these circumstances, disposition of this case without plenary consideration would not provide guidance to lower courts in future compulsory retirement cases.

D. Appellant Was Denied Due Process Of Law by His Compulsory Retirement.

This Court has held that public employment constitutes a right subject to protection under the due process clause of the United States Constitution which cannot be arbitrarily terminated. See *Board of Regents v. Roth,* 408 U.S. 564 (1972); *Perry v. Sindermann,* 408 U.S. 593 (1972); *Arnett v. Kennedy,* 416 U.S. 134, 164-

231 (1974) (conc. and dissenting opinion); *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968); *Elrod v. Burns,* 427 U.S. 347 (1976). Appellant's right to due process of law was denied because he was the victim of a stigmatizing irrebuttable presumption of incompetency. Moreover, Wisconsin's practice to extend the employment of selected civil servants beyond age 65 while totally denying Appellant the right to be considered also denied him due process of law.

Mr. Justice Rehnquist, dissenting in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 659 (1974), indicated that the logic of the irrebuttable presumption doctrine could invalidate mandatory retirement statutes. Lower courts, however, have expressed uncertainty about the continuing vitality of the irrebuttable presumption doctrine as applied to compulsory retirement cases. See *Trafalet v. Thompson,* 594 F. 2d 623, 629-30 (7th Cir. 1979). *Palmer v. Ticcione,* 576 F. 2d 459, 463 (2nd Cir. 1978); *Johnson v. Lefkowitz,* 566 F. 2d 866, 869 (2nd Cir. 1977); and *Rubino v. Ghezzi,* 512 F. 2d 431 (2nd Cir. 1975), *cert. denied,* 423 U.S. 891 (1975) concluded that statutory classifications sustainable as rationally based should not fall because they might be labeled as presumptions. This Court should decide whether the irrebuttable presumption doctrine remains effective.

CONCLUSION

This Court should note probable jurisdiction of this case and consider the constitutionality of compulsory retirement statutes as applied to general civil service employees.

Respectfully submitted:

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APPENDIX

OPINION AND ORDER (Formal Parts Omitted)

LUTHER M. SWYGERT, Circuit Judge; JAMES E. DOYLE, District Judge; MYRON L. GORDON, District Judge.

DOYLE, D. J. This is an action for declaratory and injunctive relief relating to the plaintiff's compelled retirement from his employment as an attorney-hearing examiner for the Department of Industry, Labor and Human Relations of the State of Wisconsin (DILHR). Jurisdiction is present. 28 U.S.C. §1343 (3); 42 U.S.C. §1983. Because plaintiff seeks to enjoin the enforcement and execution of §§41.11 (1), 41.02 (23), and 42.531 of the Wisconsin Statutes, with respect to the rule of compulsory retirement at age 65 embodied in those statutes, on the ground that this statutory provision violates the Fourteenth Amendment to the Constitution of the United States, a three-judge court has been convened pursuant to the provisions of 28 U.S.C. §2281-2284, as they read at the time the action was commenced. The case has been tried on the merits. The court finds as fact those matters set forth hereinafter under the heading "Facts."

FACTS

Plaintiff is a resident and citizen of the United States and of the State of Wisconsin, residing in Madison, Wisconsin. Defendant is the Secretary of DILHR, and is the successor to the officials earlier named as defendant (references herein to "the defendant" will include his predecessors).

Plaintiff is a lawyer licensed to practice in the State of Wisconsin. His date of birth is January 9, 1909. On or about September 21, 1964, plaintiff became an attorney-hearing examiner for the Wisconsin Industrial Commission, the predecessor of DILHR (references herein to DILHR will include its

predecessor). His duties and responsibilities were hearing and determining cases involving disputed claims for unemployment compensation. Plaintiff successfully served a probationary period and became a qualified civil service employee of DILHR. Plaintiff continued to serve as such attorney-hearing examiner until about April 8, 1974.

Under Wisconsin Statutes and regulations adopted pursuant thereto, as a nonprobationary classified civil service employee, plaintiff could not be separated from his employment nor could his employment be terminated without cause first having been established, except for the compulsory retirement provisions at issue in this case.

Prior to December 1, 1972, DILHR policy concerning retirement was that an employee age 65 and over could apply for and receive an extension of the retirement date through the end of the year in which he or she reached the age of 65 years.

In approximately August, 1972, plaintiff and other DILHR employees were informed that as of December 1, 1972, all employees would be compelled to retire at the ends of the quarters in which they would reach the age of 65, and that no employment would be extended beyond this time. The stated reasons for this policy were "to enable the employe to plan ahead for retirement and to know a definite date without having to wonder whether or not he or she will be extended, to have a uniform policy throughout the department, to bring our policy into account with the statute and with other state agencies and to make an opportunity for advancement of others."

At all times from the beginning of his employment with DILHR to the present, plaintiff has been physically and mentally able to perform the duties of an attorney-hearing examiner with DILHR.

Between June 22, 1973 and August 2, 1974, plaintiff made written and oral requests to defendant for an extension of his retirement date and, after retirement was effected, for reinstatement. Pursuant to and acting under color of §§41.11 (1), 41.02 (23), and 42.531, Wis. Stats., and administrative policies and regulations promulgated pursuant thereto, the defendant initially terminated plaintiff's employment and caused his compulsory retirement on or about April 8, 1974, and prior thereto and subsequent thereto rejected all of plaintiff's requests for extension of his employment and for reinstatement in his employment, on the ground that no exceptions could be made to the requirement of retirement at the end of the quarter in which the plaintiff became 65 years of age. In taking this action, defendant did not consider plaintiff's experience, training, and competence to remain in his employment beyond age 65, granted no hearing on the question, and considered no evidence other than his age.

After March 31, 1974, plaintiff sought employment as a hearing examiner or attorney with other agencies of the State of Wisconsin, including the Departments of Justice, Health and Social Services, and Regulation and Licensing. He also sought employment with the City of Madison. In each instance, employment was denied pursuant to Wisconsin statutes and state policies prohibiting hiring of persons whose age exceeds 65 years. As a result, he has been foreclosed from obtaining employment with the State of Wisconsin and municipalities under terms and conditions he formerly enjoyed.

Plaintiff also attempted to obtain employment from private firms and the federal government. He filed over 100 applications for employment in legal and other capacities. He has been unable to obtain any full-time employment since the date of his retirement. He

has been able to obtain occasional temporary part-time work in isolated instances. These items have provided him with approximately $500 to $600 per year of gross income through 1977 and have consisted of giving lectures at the University of Wisconsin and handling an occasional legal matter or hearing. Since February of 1978, plaintiff has been analyzing contracts for a local business concern. He receives $4 per hour gross income and earns approximately $450 per month, depending upon the hours of work available.

Plaintiff's pension and social security income is less than one-third of the amount he was earning before retirement. Inflation has eroded the value of his pension. This reduction of income has adversely affected his standard of living and life style and has caused him considerable concern.

As a result of plaintiff's compelled retirement, he has been deprived of salary increases and of an increase in pension and life insurance which would have resulted from annual increases in pay and additional time on the job for DILHR. The salary of hearing examiners presently is approximately $22,000 per year. Had plaintiff continued as an employee through December, 1974, he would have received approximatley an additional $29 per month pension for life.

People age physically and mentally at different rates. Some persons older than 65 years of age continue to be wholly competent to perform various tasks of employment, including those performed by attorney-hearing examiners for DILHR, and some persons who have not yet reached the age of 65 years have lost their competency to perform such tasks.

Compulsory retirement at a given age such as 65 adversely affects the health and well being of some persons but not others. Such adverse effects often

include loss of self esteem, feelings of worthlessness, major depression reactions, and sometimes suicidal dispositions.

It is difficult for persons 65 years of age and older to obtain employment. Generally, persons who are retired and who have no employment or little employment suffer more severe economic hardship than those who have not retired.

With respect to retirement plans such as the Wisconsin Retirement Fund, it is necessary to establish a "normal retirement date," whether age 65 or some other age, in order to establish actuarial costs and benefits for the retirement system. However, within such a retirement plan, provision can be made for those who choose to retire prior to the normal retirement date and for those who choose not to retire until they have reached various ages beyond the normal retirement date. No significant administrative difficulty is involved in accommodating desires for retirement earlier or later than the normal retirement age.

OPINION

That serious hardship, even physical and mental illness as well as financial deprivation, is directly caused in some cases by a compulsory retirement rule at a given age, and that such a compulsory retirement rule deprives the community of the significant resource of the services of wholly competent persons of a greater age are considerations which might be persuasive to a legislative body in deciding whether to elect a fixed age as the condition for compulsory retirement and, if so, whether to select a greater or a lesser age. Effective as of January, 1979, for example, Congress has been persuaded by such considerations

to provide that 70 years is the earliest permissible age at which retirement by reason of age may be compelled in employment by state or local government. 92 Stat. 189. Also, on September 26, 1978, the Governor of the State of Wisconsin promulgated a policy directive that all employees designated as "general" for Wisconsin Retirement Fund purposes who were scheduled to retire involuntarily, by reason of age, prior to January 1, 1979, might continue to work, provided they were able to perform their job duties.

Nevertheless, discrimination engaged in by legislatures with respect to a particular age for compulsory retirement from public employment is presumed to comply with the Constitution of the United States, and the burden is upon the challenger to show that no legitimate state interest is at stake or, if a legitimate state interest is at stake, that the particular age discrimination chosen is not rationally related to furthering the legitimate state interest. *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976). Unless the challenger meets this burden, a legislative choice to impose upon older employees the negative consequences of compulsory retirement at a fixed age does not violate the equal protection clause of the Fourteenth Amendment. *Murgia,* at 316-317; *Vance v. Bradley,* 47 Law Week 4176 (Supreme Court of the United States, February 22, 1979); *Trafelet v. Thompson,* 594 F. 2d 623 (7th Cir. 1979).

In the course of this litigation, defendant has asserted that the following five state interests are at stake in the legislative decision to create and maintain a retirement plan and fund: (1) facilitating employers' planning for personnel needs in an orderly manner; (2) facilitating employees' planning for retirement based upon a specific date; (3) providing the opportunity for employment of younger workers; (4) providing an

opportunity to correct past discrimination in public employment based upon sex and race; and (5) providing for orderly removal of older workers without hardship or prejudice. Each of these state interests is indeed at stake and each is legitimate. However, defendant's formulation appears to be a studied effort to avoid the critical issue. It is not a question whether a retirement plan and fund, in general, is a means rationally related to furthering any or all of the five state interests articulated. It is a question, rather: (a) whether the inclusion in such a retirement plan and fund of a provision for compulsory retirement at a fixed age is a means rationally related to furthering any or all of the five state interests articulated; and (b) if so, whether the inclusion of age 65 as the fixed age is such a rationally related means.

In a certain rather abstract and pure sense of the word "rational," it could be said that the inclusion of any fixed age for compulsory retirement in a retirement plan and fund is a means rationally related to: (1) facilitating employers' planning for personnel needs in an orderly manner, (2) facilitating employees' planning for retirement based upon a specific date; (3) providing the opportunity for employment of younger workers; (4) providing an opportunity to correct past discrimination in public employment based upon sex and race; and (5) providing for orderly removal of older workers without the opportunity for administrative error in determining, case by case, whether one employee or another remains capable of performing his or her duties./[1] But in this sense of "rationality," any

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[1]/State interest number (5), as articulated by defendant, is to provide for orderly removal of older workers "without hardship or prejudice." It is true that the provision of benefits to retired employees reduces

maximum age will do, whether it be 25 years of age, 30, 35, 65 or 85. Age 65 as a maximum has less to commend it as "rationally" related to state interest (3) and (4) than age 35, for example, and appears to have no more to commend it as "rationally" related to state interests (1), (2) and (5).

Possibly the meaning of the so-called rational relationship test in constitutional litigation is that because a compulsory-retirement-at-35 statute would be rational in the same sense that a compulsory-retirement-at-65 statute would be rational, neither would be vulnerable to constitutional challenge. More starkly, if the sole legitimate state interest at stake were its interest in facilitating state employers' planning for personnel needs in an orderly manner, for example, and if compelling retirement at 35 years is rationally related to furthering that state interest, as it is, perhaps courts must refrain from setting aside the legislative decision, however unwise it might be to deprive the community of the services of all those over 35, however harsh it might be to deny to those over 35 the opportunity for public employment, however perilous it might be to reduce so sharply the factor of experience in the entire body of state employees. Language of the Supreme Court of the United States in *Vance v. Bradley,* 47 Law Week 4176, 4177, 4179, 4180, 4181, strongly suggests that the limits upon judicial intervention may well be so radical.

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the financial hardship, although by no means eliminating it, but the specific requirement of retirement at a given age cannot be said to be a means of eliminating or reducing hardship attendant upon retirement, nor can it be said to eliminate prejudice except in the sense in which the point has been restated in the text, above.

However, it seems more probable that even the permissive test of rational relationship would not permit the courts to refrain in 1979 from invalidating a statute that requires retirement at age 35. This would be true because the constitutional inquiry cannot be so narrowly focused as to identify a single legitimate state interest and a single means and to examine the rationality of the relationship of one to the other, when, in a larger context, the entire measure is virtually universally perceived as wildly irrational and unjust. For the purpose of deciding the present case, therefore, we think it necessary to consider, first, whether there is at stake a state interest beyond the five so warily articulated by the defendant, and, if so, whether the choice of age 65 as a ceiling on public employment is rationally related to furthering such additional state interest.

Our inquiry is not to be limited to purposes articulated in the statute or even to those articulated by the defenders of the statute in the course of litigation. The test is "whether any state of facts may reasonably be conceived to justify the classification." *Trafelet v. Thompson, supra,* at 626.

Clearly there is a legitimate state interest in achieving and maintaining a certain level of physical, mental and emotional competence among governmental employees. This interest is rationally served by various devices in the recruitment process. It is also rationally served by devices designed to remove those employees whose physical, mental and emotional competence becomes sufficiently impaired while in the state's employ, whether it is trauma, disease, the effects of aging, or other factors which cause the impairment./[2]

/[2]No unfairness to this plaintiff results from our consideration of the state's interest in achieving a

With respect to impairment as a consequence of aging, *Murgia* and *Vance v. Bradley* have established that the legislature may constitutionally choose the device of a universally fixed age for compulsory retirement, as opposed to a case-by-case examination of the competence of each employee, and that, at least within a reasonably narrow band of possible ages, it is wholly for the legislature to select the very age. Crudities implicit in the fixed-age device itself, in that some below the age may have become incompetent by reason of aging while some above it remain fully competent, and crudities implicit in the choice of age 65, for example, rather than 64 or 66, are constitutionally tolerable. See *Vance v. Bradley,* at 4180.

As our findings of fact reflect, plaintiff has made an impressive showing in this case that persons age physically and mentally at different rates, that some persons well beyond the age of 65 remain wholly competent to perform the tasks of public employees, and that some well short of that age have lost their competency to perform. But plaintiff has not succeeded in the essential, though perhaps impossible, task of showing that there is no significant discrepancy in the incidence of incompetence resulting from aging among those approximately 55 to 60 years of age as contrasted with those approximately 70 to 75 years of age. In the absence of such a showing, the legislative choice of an age between 60 and 70 must be accepted.

We appreciate that in *Murgia,* the compulsory retirement provision applied only to police officers; that in *Vance v. Bradley,* only to those covered by the

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certain level of physical, mental and emotional competence among its employees. Although this interest has not been advanced in the defense of the case, plaintiff has devoted his principal attention to it in his factual showing and in his argument.

Foreign Service retirement system; that in *Trafelet v. Thompson,* only to judges of the courts of a state; and that in each case reasons for the requirement were present which do not apply to as broad or as various a group of public employees as that covered by the Wisconsin statutes and regulations challenged here. However, the standard of scrutiny which the Supreme Court expressly chose in *Murgia* and *Vance v. Bradley,* and the rationale then employed in both cases, compel the same result in the present case.

The role of an attorney-hearing examiner is closely enough related to that of a judge of a state court to bring plaintiff's individual case within the scope of *Trafelet.* Assuming, although it seems a most dubious assumption, that plaintiff would enjoy standing to challenge the application of the maximum age rule to some activity in state employment in which no consequence would follow from age-related diminution in physical, mental or emotional competence, it is clearly plaintiff's burden to pinpoint the existence of such an activity within state employment. Thus this burden has not been met.

In *Gault v. Garrison,* 569 F. 2d 993 (7th Cir. 1977), the district court had dismissed the complaint on the ground that it failed to state a claim upon which relief could be granted. The court of apppeals reversed the order of the district court (at 997): "Because plaintiff's complaint states a claim that her rights under the Fourteenth Amendment have been violated...." The case was remanded for further proceedings consistent with the opinion of the court of appeals. In the present case, the plaintiff has responded to the opportunity to offer evidence at trial. However, given that opportunity, the plaintiff has failed to meet the burden of proving that the age discrimination embodied in the challenged statutes is not rationally related to furthering a legitimate state interest. Consequently, we hold

that the plaintiff has failed to prove his case on the merits of the constitutional question.

Accordingly, upon the basis of the entire record herein, it is ordered that judgment be entered dismissing this action on its merits.

Entered this *6th* day of *August*, 1979.

BY THE COURT:

/s/ Myron L. Gordon
Myron L. Gordon
District Judge

/s/ James E. Doyle
James E. Doyle
District Judge

SWYGERT, Circuit Judge, dissenting. Regrettably, I am compelled to dissent. *Murgia* and *Vance* are, in my opinion, pointedly distinguishable from the case before us and ought not control our decision. Both cases dealt with a distinct group of Government employees whose peculiar job requirements justified compulsory retirement at an age earlier than civil service workers generally. Here the Wisconsin statute makes no distinction among the state employees even though they may have positions in which age may or may not be a factor. It is an across-the-board statute. This, I believe, makes for a meaningful distinction; neither *Murgia* nor *Vance* addressed the question whether a compulsory retirement statute for all State employees who reach 65 years old can be rationally based.

The Wisconsin statute was enacted in its present basic form in 1947. It may well be that a rational basis serving legitimate state purposes could be constructed — in hindsight — for compulsory retirement at 65 years old in 1947. But this is 1979, and the world has moved ahead from 1947. For example, Congress amended the Federal Age Discrimination in Employment Act of 1967 in 1977, raising the ceiling for application of that statute's antidiscriminatory prohibitions from 65 to 70 years of age. *See* 29 U.S.C. §§621 *et seq.*/[1] The Senate Report accompanying those amendments provides eloquent and persuasive evidence of the fact that a general compulsory retirement law at age 65 presently can serve no legitimate state purpose:

> The act's current age limitation unfairly assumes that age alone provides an accurate measure of an individual's ability to perform work. In fact, the evidence clearly establishes the continued productivity of workers who are 65 years of age and older. First, there were 2.7 million persons age 65 and older working in 1976. 1.6 million of them are 65 to 69 years of age and 1.1 million of them are age 70 and older. There are individuals who work into their eighties and even nineties. Second, there is substantial evidence that many workers can continue to work effectively beyond age 65 and may, in fact, be better employees because of experience and job commitment.

S. Rep. No. 493, 95th Cong., 1st Sess. 3 (1977).

/[1]Federal employees covered by the Civil Service Retirement system have no mandatory retirement age. *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, §5 (c), 92 Stat. 191.

The rational basis for a law may dissipate over time. That is the situation here. This is exemplified by the current practice of selectively exempting certain Wisconsin state employees from the requirement to retire at age 65./[2] Aside from its unequal treatment implications, this practice fatally undermines the hypothetical purposes (purposes which were never articulated by the Wisconsin legislature itself) advanced by the Attorney General for the statute.

I would hold that the Wisconsin statute violates the Fourteenth Amendment.

/[2]The affidavit of John L. Zimbeck, Deputy Secretary of the Wisconsin Department of Employees Trust Funds, reads in part:

> There are some employees who do not retire until after the normal retirement age because their employment may be continued by the state agency that employs them. Attached hereto and marked Exhibit B are statistics which reflect the age of publicly employed persons participating in the Wisconsin Retirement Fund. As of March 13, 1978, 261 men and 219 women over age 65 were continued as public employees and as contributors to the Wisconsin Retirement Fund. A regular public employee who works beyond the age of 65 receives a pension increase for each year that he works beyond age 65.

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN

Sherwood Slate,
Plaintiff,

vs.

Joseph N. Noll,
Defendant.

CIVIL ACTION FILE NO. 74-C-352
JUDGMENT

This action came on for trial before the Court, Honorable Luther M. Swygert, Circuit Judge, Honorable James E. Doyle, District Judge and Honorable Myron L. Gordon District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that this action be dismissed with costs.

Dated at Madison, Wisconsin, this *7th* day of August, 1979.

/s/ Joseph W. Skupniewitz
Joseph W. Skupniewitz, Clerk

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN

SHERWOOD SLATE,
Plaintiff,

vs.

JOSEPH N. NOLL, et al.,
Defendant.

NOTICE OF APPEAL
Case No. 74-C-352

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE
UNITED STATES

NOTICE IS HEREBY GIVEN that Sherwood Slate, the plaintiff above-named, hereby appeals to the Supreme Court of the United States from the final Judgment dismissing the Complaint entered in this action on August 7, 1979.

This appeal is taken pursuant to 28 U.S.C., §1253.

Dated: September 4, 1979.

/s/Daniel W. Hildebrand
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